Petition

81-671

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NO. _____

THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JOHN T. LEWIS,

PETITIONER

VERSUS

UNITED STATES OF AMERICA,

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

DID THE INTRODUCTION OF THE FEDERAL INCOME TAX RETURNS OF ELKHORN MINING CORPORATION VIOLATE 26 USC § 6103 AND THE CORPORATION'S AND THE PETITIONER'S RIGHT TO PRIVACY UNDER THE UNITED STATES CONSTITUTION, AND WAS THE PETITIONER PREJUDICED THEREBY?

Petitioner says yes.

TABLE OF CONTENTS

	Page
Questions presented for review	i
Table of Contents	ii
Table of Authorities	iii
Opinion Below	1
Jurisdiction	2
Constitutional Provisions And Statutes Involved	2
Statement of the Case	3
Reasons for Review	6
Conclusion	19
Affidavit of Service	20
Appendix	A-1
Judgment Below	A-1
Order	A-8
Consitutiton, Ninth Amendment	A-9
26 USC § 6103	A-9
26 USC § 7213	A-13

TABLE OF AUTHORITIES

Cases	Page
Commissioner v. Brown, 380 US 563, 85 SCt 1162, 14 LEd2d 75 (1965)	11
Griswold v. Connecticut, 381 US 479, 85 SCt 1678, 14 LEd 2d 510 (1965)	7
Roe v. Wade, 410 US 113, 93 SCt 705 35 LEd2d 147	7
Simpson v. U. S., 435 US 6, 98 SCt 909, 55 Led2d 70 (1978)	12

Statutes	Page
26 USC § 6103	7,8,9,19,20
26 USC § 7213	19

Constitution	Page
First Amendment	7
Second Amendment	7
Fourth Amendment	7
Fifth Amendment	7
Ninth Amendment	7

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JOHN T. LEWIS,

Petitioner

VS.

UNITED STATES,

Respondent

Petition for Writ of Certiorai to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

Petitioner, JOHN T. LEWIS, respectfully prays this Court to issue a Writ of Certiorai to review the final decision of the United States Court of Appeals for the Ninth Circuit entered on May 18, 1981.

OPINION BELOW

The decision at the trial court level

was made without opinion. The opinion itself of the U.S. Court of Appeals for the Ninth Circuit was made without reporting in any official or unofficial manner as it was not designated for publication. The full text of it appears in the Appendix beginning at page A-1.

JURISDICTION

The opinion of the U.S. Court of Appeals was entered upon May 18, 1981. Upon a timely petition for rehearing, an Order was entered on July 9, 1981, denying any rehearing. The jurisdiction of this Court is invoked under 26 USC § 1254.

CONSTITUTIONAL PROVISIONS & STATUTES INVOLVED

Constitution of the United States, Ninth Amendment

26 USC §6103

26 USC §7213

STATEMENT OF THE CASE

This cause was begun upon the filing of an information in the United States District Court for the District of Montana, Butte Division, charging the Defendant with three counts of violating 26 USC §7203, for the years 1976, 1977, and 1978. This information was filed on May 14, 1981. Trial was begun in District Court on September 15, 1980, the Honorable W.D. Murray presiding. On September 17, 1980, the Jury returned a verdict of "not guilty" as to Count One, and a verdict of "guilty" as to Counts Two and Three of the Information. On September 19, 1980, the Court entered its judgment of acquittal as to Count One, and entered its judgment of conviction as to Counts Two and Three, and suspended imposition of sentence as to Count Two and placed the Defendant on probation for three years. As to Count Three, the

Court imposed a sentence of one year in the custody of the Attorney General of the United States, on condition that the Defendant be confined to a jail type institution for a period of six months, and that the remainder of the sentence be suspended and the Defendant placed on probation for three years.

For the tax year 1976, the Defendant filed a 1040 form with the Internal Revenue Service which on its face raised objections to specific questions on the return and claimed specific Constitutional rights, including the Fifth Amendment. There were several documents attached to the 1040 as part of the return. The document on its face included an offer to refile or amend in any manner if the Internal Revenue Service so wished, and would show the Defendant how to do so without waiving those rights claimed on the face of the 1040 form. The Defen-

dant received a letter from the IRS stating that the return was not acceptable, and he responded with a letter stating that his intentions were not to evade tax, but to make a lawful challenge in good faith to the income tax. The letter also offered to amend or refile if the IRS would kindly tell him how to do so without waiving his rights previously asserted. There was never any such assistance given to the Defendant or offered to be given by the IRS, or any other government agency.

For 1977 and 1978, nothing was filed with the Internal Revenue Service in the way of a 1040 form.

During the course of the trial, the government offered into evidence the corporate income tax returns of Elkhorn Mining Company for the years 1976, 1977 and 1978(R.T. pp.32-35; Exhibits 10, 11, and 12). Supposedly, the purpose of intro-

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ducing these exhibits was to show income to the Defendant from Elkhorn Mining Company. However, the government also introduced into evidence, before the introduction of the corporate returns, W-2 forms for 1976, 1977 and 1978 from Elkhorn Mining Company to the Defendant (R.T. pp. 23-24; Exhibits 1,2,and 3), compensation records for the Defendant for the same period of time (R.T.pp.23-24; Exhibits 4,5, and 6) and even the individual payroll checks from Elkhorn Mining Company to the Defendant for the same years (R.T. pp.23-24; Exhibits 7,8, and 9). So, at the time the government introduced the corporate returns, it already had evidence from three different sources, all showing that the Defendant had received a salary from Elkhorn Mining Company of $9,600.00 for 1976, 1977, and 1978

REASONS FOR ALLOWING THE WRIT

The basic question for review here

concerns the construction of 26 USC §6103. The Court of Appeals for the Ninth Circuit has construed this section so as to deny its effect, and in conflict with the Ninth Amendment to the Constitution of the United States.

This question is new to this Court, and there needs to be a clear standard set forth to prevent these problems in the future.

It is not disputed that the enumeration of certain guaranteed rights in the Constitution and Bill of Rights contain zones of privacy. In particular, the First, Third, Fourth and Fifth Amendments all have their particular zones of privacy to which they apply. In addition, the Ninth Amendment penumbra of rights goes beyond those enumerated earlier. See Griswold v. Connecticut, 381 US 479, 85 SCt 1678, 14 LEd2d 510(1965) and Roe v. Wade, 410 US 113, 93 SCt 705, 35 LEd

2d 147.

Congress, in deference to that right of privacy, in regards to income tax returns and return information, passed 26 USC §6103. That section provides for strict confidentiality of all returns and return information, and expressly disclosure of same except in certain specified instances.

§6103 (h)(4) defines "tax administration" to include enforcement of internal revenue laws. Since Petitioner's case was one of enforcement of 26 USC §7203, it falls squarely in the definition of "tax administration".

Therefore, the only part of §6103 which would apply to disclosure of the material introduced was the return of the corporation, who was not a party to the proceeding, the only part which would apply would be §6103 (h)(4)(B).

The Appeals Court stated that there is no requirement under 26 USC §6103(h)(4)(B) that the returns be necessary to prove an issue at trial. However, that Section provides that the returns must be "directly related to the resolution of an issue in the proceeding." (emphasis added) "Resolution" means, in this context a "final determination". Obviously, once an issue has been determined and decided, additional testimony does nothing further towards resolving that issue. The Appeals Court stated that "The returns showed that Appellant, as president of the Elkhorn Mining Company, was paid a salary of $9,600.00 in 1977 and 1978." However, that exact testimony had already been established three times before the returns were ever offered as evidence.

The government introduced W-2 forms

for 1976, 1977 and 1978 from Elkhorn Mining Company (R.T. pp. 23-24; Exhibits 1,2, and 3). These W-2 forms established "that Appellant, as president of the Elkhorn Mining Company, was paid a salary of $9,600.00 in 1977 and 1978."

Further, the government introduced compensation records for the Defendant from Elkhorn Mining Company for those years (R.T. pp.23-24, Exhibits 4,5, and6). These compensation records established "that Appellant, as president of the Elkhorn Mining Company, was paid a salary of $9,600.00 in 1977 and 1978."

And finally, the government introduced the individual payroll checks from Elkhorn Mining Company to the Defendant (R.T. pp.23-24; Exhibits 7,8, and 9). These checks established "that Appellant, as president of Elkhorn Mining Company, was paid a salary of $9,600.00 in 1977 and 1978." These checks were signed by

by the Defendant in his capacity as president and endorsed by the Defendant as well.

Therefore, by the time the returns were offered into evidence, (R.T. pp.32-35), there no longer remained any issue "that Appellant, as president of Elkhorn Mining Company, was paid salary of $9,600.00 in 1977 and 1978." That issue had been fully and finally resolved. Therefore, introduction of the Corporate returns could not have been directly related to the resolution of that issue.

The Statute, §6103, does not say "directly related to evidence of an issue", which is the construction the Appeals Court is placing on the statute, it says "resolution", and the Court is bound to use the ordinary meaning of the word, Commissioner v. Brown, 380 US 563, 85 SCt 1162, 14 LEd2d 75 (1965), and also bound to accept that definition which is

more lenient to the Defendant, Simpson v. U.S., 435 US 6, 98 SCt 909, 55 LEd2d 70 (1978).

In addition, the Corporate return for 1978 was not even signed by the Defendant (R.T. p. 36) and therefore had even less, if any at all, evidentiary value to offer to the case.

Had that been the extent of the error, there would probably been no problem. However, the government improperly used that evidence against the Petitioner. The Appeals Court overlooked this area entirely.

The Appeals Court stated that the "government's closing argument mentioned the corporate tax returns only to refute Lewis' claim that he did not, in good faith, understand the meaning of the term 'dollar' in the 1040 returns." In making that statement, the Appeals Court totally ignored the comments made by the government

which were: "Nobody gave him an answer of his Constitutional rights so he can't fill out an income tax return. He tells you he had that belief in 1976, 1977 and he had it in 1978 . . . . At the bottom it tells you it is made according to certain objections. This he did on April 15, 1977 according to his belief. Was he consistent? No, he wasn't. If you take a look at Plaintiff's Exhibits 10 and 11, on May 16, 1977, not even a month later, all of a sudden, what is it Mr. Stradley said, he guessed right or guessed wrong. I guess he guessed right because here is a corporate return for Elkhorn Mining Corporation"(emphasis added)(R.T. pp.90-91).

Defendant objected to this improper line of argument and was overruled by the Trial Court (R.T. p.91).

Clearly the argument as stated above

was that you could not raise Constitutional rights and objections on your personal return and then in good faith turn around and file corporate returns without these same Constitutional objections. The argument was not just directed to the understanding of "dollars" it was more strongly directed to the Defendant's claim of his Constitutional rights.

Further, the government did not stop there, the argument went on to say "And again, did he think he could really incriminate himself on the 19th by letting the Government know what his gross income was. Again less than a month later, he signed returns as president, his signature is there, he submitted it for Elkhorn Mining Company and on page 2, it gave that same exact information, $9,600.00 paid to John T. Lewis, gives his Social Security number and everything. That was

used in this case against him to show that he earned that money. What----- was he consistent in his belief? No." (R.T. pp.91-92) (emphasis added)

Again, the clear argument was that the Defendant could not claim the Fifth Amendment on his individual tax returns in good faith, and be consistent with filing corporate tax returns without claiming the Fifth Amendment again there, and this Court's statement that the argument "did not suggest that Appellant's signing of the corporate tax returns prevented him from claiming the Fifth Amendment on his individual tax returns," was clearly erroneous and overlooks the record entirely.

Further, these improper arguments were made during the rebuttal part of the government's closing argument, and the Defendant had no opportunity to answer

and to clear up the misconceptions in the minds of the jury left by the argument, except through jury instruction.

Immediately at the close of the arguments, the Defendant requested that the Court instruct the jury that the Corporation has no right to claim the Fifth Amendment on its tax return (R.T. p.93). This would have helped to counter the direct assertion by the government that claiming the Fifth Amendment on the individual tax return was not "consistent" with not claiming it on the corporate return (R.T. pp.90-92).

This question was not raised for the first time on appeal, as it was specifically requested at trial (R.T. p.93; see refused Jury Instructions) and further exception to the court's refusal was not necessary.

Again, the Court's Statement that "the government did not argue that Appellant's failure to claim a Fifth Amendment privilege on behalf of the corporation barred Appellant from claiming the Fifth Amendment privilege on his individual tax return," is totally inconsistent with the record(R.T. pp.90-92).

The Defendant had offered to refile or amend his returns if the Internal Revenue would show him how to do so without waiving his Constitutional rights both on the 1976 return filed and in his letter responding to the Internal Revenue Service's letter they had not received an acceptable return (Exhibits 19 and 21). His letter also stated that he could not in good conscience fill out a tax return the way they wanted to without waiving his rights (Exhibit 21).

This letter coupled with the 1976 return would have been sufficient evidence of a good faith challenge to the income tax, absent the corporate tax returns.

The introduction of the corporate returns, without any instruction that the rights and responsibilities that go with filing a corporate return are completely different than those connected with filing an individual return, left the jury with nothing to balance the filing of the corporate returns. The fact that the Court overruled the Defendant's objections based on the fact that corporate returns are completely different from individual returns left the unmistakeable impression on the jury that there was no difference.

Therefore, not only did the government invade the Petitioner's and his corporation's right to Privacy, they then improperly used that information against

him to his detriment.

§6103 is to be strictly applied. This is evident from the fact that Congress not only passed that section, they also passed 26 USC §7213. This section makes it a felony for a Federal employee, and certain other persons, to improperly disclose returns or return information, with added penalties of paying costs of prosecution and mandatory dismissal from office or discharge from employment, upon conviction.

Obviously, the right to privacy protected here is a serious matter, and not to be taken lightly.

CONCLUSION

As can be seen, the trial court improperly admitted the corporate returns. This coupled with the government's improper argument deprived the Petitioner of a fair trial.

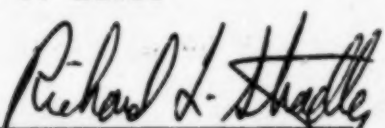
The issue of the construction of 26

USC § 6103 is new to this Court, and the writ needs to be granted to establish the guidelines for its use and to prevent the erosion of the right to privacy which it protects.

Accordingly, the Court of Appeals decision affirming Petitioner's conviction should be reversed and the information should be dismissed. Or, in the alternative, a new trial should be ordered. Therefore, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN T. LEWIS

By: 

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AFFIDAVIT OF SERVICE

Personally appeared before me, the

undersigned authority in and for the State of Montana, County of Missoula, the within named Richard L. Stradley, who after being by me first duly sworn, stated on oath that he had mailed, postage prepaid, by United States Mail, a true and correct copy of the above and foregoing Petition to Counsel for the Respondent, the Solicitor General, Department of Justice, Washington, D. C. 20530, on the 4th day of September, 1981.

Richard L. Stradley

SWORN to and subscribed before me on this the 4TH day of September, 1981.

K.R. Hart
NOTARY PUBLIC

My Commission Expires:

May 15, 1982

APPENDIX

JUDGMENT TO BE REVIEWED:

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
APPELLEE,	)	
	)	
VS.	)	NO. 81-1690
	)	
	)	D.C. No. CR-80-8-BU
JOHN T. LEWIS	)	
	)	
APPELLANT	)	

Appeal from the United States District Court for the District of Montan

Before: GOODWIN and ALARCON, Circuit Judges, and SCHWARZER, *District Judge

---

* The Honorable William W. Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

Appellant John T. Lewis appeals from his conviction under 26 USC §7203 for failure to file personal income tax returns in 1977 and 1978. We affirm the judgment of conviction.

1) Appellant argues that the Court erred in admitting certain corporate tax returns of the Elkhorn Mining Company. Admission of the corporate tax returns was proper. The returns showed that Appellant as president of the Elkhorn Mining Company was paid a salary of $9,600 in 1977 and 1978. The returns thus helped establish that Appellant had sufficient income to require him to file an individual tax return. 26 USC §7203. The corporate tax returns were therefore admissable under 26 USC §6103(h)(4)(B) because they were directly related to the resolution of an issue in the proceeding. Appellant's argument that the returns were inadmissable because they were cumulative is without

merit. There is no requirement under 26 USC §6103(h)(4)(B) that the returns be necessary to prove an issue at trial.

Appellant argues further that the government improperly referred to the corporate tax returns in its closing argument. According to Appellant, the government's argument suggested that Appellant's signature on the Elkhorn returns, in his capacity as president of the corporation precluded Elkhorn from raising the Fifth Amendment argument on his personal income tax return. This argument is not persuasive. The government's closing argument mentioned the corporate tax returns only to refute Lewis' claim that he did not, in good faith, understand the meaning of the term "dollar" in the §1040 return. It did not suggest that Appellant's signing of the corporate tax returns prevented him from claiming the Fifth Amendment on

his individual tax returns.

2) Appellant claims that the district court erred in denying him motion for acquittal. Similarly, Appellant argues that the evidence was insufficient to support the jury's guilty verdict on Counts II and III.

According to Appellant, the government failed to carry its burden of proving that the defendant acted willfully in failing to file individual tax returns in 1976, 1977 and 1978. We are told that this is evidenced by the jury's acquittal of Appellant on Count I in a case where the government presented the same evidence on all three counts.

Contrary to Appellant's assertion, the evidence presented by the government in this case was not the same on all three counts of the indictment. There was substantially more evidence supporting the jury's acquittal of Appellant on Count I.

In 1976, the Appellant had viled a tax return on the face of the return. Moreover, in 1976 the Appellant had written a letter to the Internal Revenue Service stating that his intentions were not to evade payment of his taxes but were to make a good faith, lawful challenge to the payment of his individual income taxes. Under tese facts, the jury might have reasonably concluded that his failure to file a 1976 tax return was not willful.

By contrast, Appellant filed no tax returns in 1977 or 1978. Nor did Appellant communicate any "good faith" concerns about incriminating himself to the Internal Revenue Service in 1977 or 1978. Indeed, Appellant conceded that his failure to file tax returns in 1977 and 1978 do not result from neglect or inadvertence on these facts. The jury was justified in concluding beyond a reasonable doubt

that Appellant's failure to file 1977 or 1978 tax returns was willful. The district court's denial of Appellant's motion of acquittal was therefore proper. See United States v. Figueroa-Paz, 468 F2d 1055, 1058 (9th Cir. 1972). The evidence was sufficient to support the jury's guilty verdict on Counts II and III.

3) Appellant asserts that the district court erred in failing to instruct the jury that a corporation has no right to claim the Fifth Amendment on its tax return. Even assuming that Appellant ca properly raise this issue for the first time on appeal, we find the contention without merit. The Fifth Amendment rights of the Elkhorn Mining Company were not relevant to any issue before the court. Moreover, as noted above, the government did not argue that Appellant's failure to claim a Fifth Amendment privilege on behalf of the corporation barred Appellant

from claiming the Fifth Amendment privilege on his individual tax return. Rather, the government argued that Appellant's signing of the corporation's tax return undermined his claim that he did not, in good faith understand the meaning of the term "dollar" as used in his individual tax return. This evidence properly went to the question of Appellant's willfulness in failing to file tax returns, and was properly commented on for that purpose.

The judgment is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee	
VS.	D.C. NO. CR_80-8-BU
JOHN T. LEWIS	C.A. NO. 80-1690
Defendant-Appellant.	ORDER

Before: GOODWIN and ALARCON, Circuit Judges, and SCHWARZER, * District Judge.

Appellant's petition for rehearing is denied.

*The Honorable William W. Schwarzer, United States District Judge for the Northern District of California, sitting by designation.

Constitution of the United Staes, Ninth Amendment

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

26 USC §6103

§6103. Confidentiality and disclosure of returns and return information.

(a) General rule. Returns and return information shall be confidential, and except as authorized by this title--

(1) no officer or employee of the United States,

(2) no officer or employee of any State or of any local child support enforcement agency who has or had access to returns or return information under this seciton, and

(3) no other person (or officer or employee thereof) who has or had access to

returns or return information under subsection (e)(1)(D)(iii), subsection (m)(4)(B), or subsection (n).

shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee. ...

(b)(4) Tax administration. The term "tax administration"---

(A) means---

(i) the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party, and

(ii) the development and formulation of Federal tax policy relating to existing or proposed internal revenue laws, related statutes, and tax conventions, and

(B) includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions. ...

(4) Disclosure in judicial and administrative tax proceedings. A return or return information may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration, but only--

(A) the taxpayer is a party to the proceeding, or the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability, or the collection of such civil liability, in respect of any tax imposed under this title;

(B) if the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding;

(C) if such return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding; or

(D) to the extent required by order of a court pursuant to section 3500 or title 18, United States Code (18 USCS §3500) or rule 16 of the Federal Rules of Criminal Procedure (USCS Rules of Criminal Procedure, Ruly 16), such court being authorized in the issuance of such order to give due consideration to congresstional policy favoring the confidentiality of returns and return information as set forth in this title.

However, such return or return information shall not be disclosed as provided in subparagraph (A), (B), or (C), if the Secretary determines that such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation. ...

26 USC §7213

§7213. Unauthorized disclosure of information.

(a) Returns and return information.

(1) Federal employees and other persons. It shall be unlawful for any officer or employee of the United States or any person described in section 6103(n) (or an officer or employee of any such person), or any ofrmer officer or employee willfully to disclose to any person, except as authorized in this title, any return or return information (as defined in section 6103(b)). Any violation of this paragraph shall be a felony punish-

able upon conviction by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution, and if such offense is committed by any officer or employee of the United States, he shall, in addition to any other punishment, be dismissed from office or discharged from employment upon conviction for such offense.